



NAPA COUNTY

OFFICE OF COUNTY COUNSEL

1195 THIRD STREET, SUITE 301, NAPA, CALIFORNIA 94559
AREA CODE 707/253-4521 FAX 707/259-8220

ROBERT WESTMEYER, County Counsel

Monday, May 26, 2003

Our File No.

MARGARET L. WOODBURY, Chief Deputy
LAURA J. ANDERSON, Deputy
JACQUELINE M. GONG, Deputy
SILVA DARBINIAN, Deputy
STEPHEN G. STANTON, Deputy
CLAY A. JACKSON, Deputy
PATRICIA L. TYRRELL, Deputy
ROBERT C. MARTIN, Deputy
ROBERT W. PAUL, Deputy
JENNIFER YASUMOTO, Deputy
KRISHAN CHOPRA, Deputy

Fair Political Practices Commission
428 "J" Street, Suite 800
Sacramento, California 95814

Re: *Public Input on the Applicability of the Public Generally Regulation to Comprehensive Land Use Regulations*

Honorable Commission:

The purpose of this letter is to strongly support San Diego County's proposed regulation regarding the application of the "public generally" exception to comprehensive general plan amendments as well as to suggest that the regulation should be expanded slightly to include other land use regulations that have, as a practical matter, the same effect as a General Plan Amendment.

As has been discussed during the FPPC "Interested Persons" meetings that I have attended either in person or via conference call, the application of the conflict of interest rules, including the public generally exception, to broad based land use regulations is an area of confusion and difficulty for local agencies.

We agree with San Diego County that the FPPC should consider setting forth an exception to the conflict of interest provisions for a comprehensive general plan amendment that applies to a significant area of the governing body's jurisdiction. However, we further believe the regulation proposed by San Diego County is too narrow and should also be applicable to other land use regulations that, as a practical matter, have as wide an impact as a General Plan Amendment.

For example, the Napa County Board of Supervisors recently enacted a zoning regulation that increased the setback from Class I, II and III Streams to protect the environment in general and to

Fair Political Practices Commission
Re: *Public Input: Public Generally Exception*
Wednesday, June 4, 2003
Page 2 of 5

specifically protect the Napa River from further sedimentation. That regulation applies to every parcel located within the unincorporated area of the County. We see no reason why such a regulation should not receive the same treatment as a General Plan Amendment since its effect is the same as most General Plan amendments and may have a significantly broader effect than some General Plan amendments. Limiting the proposed regulation to General Plan Amendments might also have the effect of forcing jurisdictions to enact as General Plan amendments land use regulations that are more appropriately enacted as zoning or other land use regulations to qualify for the treatment afforded to General Plan regulations.¹

We therefore suggest that the proposed regulation of San Diego be revised to read as follows:

Section 18707.10. Public Generally - ~~Comprehensive~~ General Plan Amendment

- (a) The effect of a government decision on a public official's real property or business interests is indistinguishable from the effect on the public generally if all of the following apply:
 - (1) The government decision involves an amendment to the General Plan or other land use regulation of the public official's agency or district the public official represents.
 - (2) The General Plan amendment or other land use regulation applies to the entire jurisdiction of the public official's agency or district the public official represents
- (b) Notwithstanding the applicability of subdivision (a), if the general plan amendment or other land use regulation includes a provision that has a unique application to the specific real property or business interests of a public official, and such provision has little to no application to the other real property and business interests in the public official's agency or district, there is a rebuttable presumption that the effect of the general plan amendment or other land use regulation on the public official's real property or business interests is not indistinguishable from the effect on the public generally.

These types of comprehensive land use regulations attract a tremendous amount of public interest and participation. Due to their nature, and the substantial involvement of the public in the process, they result in broad based actions to advance the public interest, not private interests. This proposed regulation excludes any possible situation that such a regulation would apply to only a handful of properties. By its very nature, such a broad based land use action would be focused on serving the

¹ An editing comment is that San Diego County's reference to "Comprehensive" in the title of the regulation is confusing. Either the term should be also used in the text of the actual regulation or deleted from the Title. Deletion from the Title would seem the simplest approach.

Fair Political Practices Commission
Re: *Public Input: Public Generally Exception*
Wednesday, June 4, 2003
Page 3 of 5

overall public interest, and would not be designed to benefit a few private interests. Therefore, even assuming that the application of the general plan amendment may benefit a public official's interests, the same action would likewise benefit all other properties and interests because of the overall broad applicability of these types of land use regulations to all real property and business interests. Moreover, as described below, the proposed regulation includes a "safety valve" should the general plan amendment uniquely benefit the public official's interests.

The proposed regulation includes an exception under subdivision (b) so that it does not apply to a general plan amendment or other land use regulation that applies to all parcels within the entire jurisdiction if a provision in the general plan or other land use regulation is written in such a way so that it has a unique application to the public official's real property or business interests, and the provision has little to no application to the other real property or business interests in the official's agency or district. Under this situation, the proposed regulation provides that a rebuttable presumption is created that the effect of the government action on the public official's interests is not indistinguishable from the effect on the public generally.

This proposed regulation would increase the likelihood that elected officials would be able to participate in what are probably the most significant decisions they make affecting their constituents. Such a regulation would eliminate the problems associated with applying the conflict of interest rules to government actions involving comprehensive general plan amendments.

As was demonstrated by the public comment and input at the "Interested Persons" meeting on this subject, the conflict of interest rules, including the public generally provisions, are confusing and extremely difficult to apply to these types of comprehensive land use regulations. Moreover, it is virtually impossible for a public official to satisfy the public generally requirements if the public generally provisions are interpreted to require a public official to know the effect a government decision has on the fair market values of a significant number of other properties. We agree with San Diego County that under the current rules it is highly unlikely that a public official would ever qualify to participate in a comprehensive general plan decision, that is applicable to his/her real property interests. We would go further, however, and argue that it is also highly unlikely that a public official would ever qualify to participate in any other comprehensive land use regulation decision that is applicable to his/her real property interests.

Rules that prevent a public official from participating in a decision-making process involving comprehensive land use regulations have the effect of disenfranchising the official's constituents on the most important jurisdictional land use decisions by their elected representatives. This proposed regulation is appropriate because the nature of the decision involving comprehensive land use regulations are truly different from the usual land use regulations in terms of scale, impact, and level of public participation.

Fair Political Practices Commission
Re: *Public Input: Public Generally Exception*
Wednesday, June 4, 2003
Page 4 of 5

Finally, it is suggested that the Commission consider revising Regulation 18707.1. That regulation provides that the public generally exception is not applicable if "the governmental decision will affect the public official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation". Your staff seems to interpret the regulation as though it also includes the word "degree". Thus, in the case of Napa County's Stream Setback Ordinance, the FPPC staff felt it was required by the existing regulations to take the position that the Public Generally Exception did not apply, even though over 9,000 parcels were affected in the same manner (i.e. by having their setback from streams increased), because it was not possible to determine whether all 9,000 parcels would be affected in the same degree. We respectfully suggest that clarifying the regulation to indicate that if a regulation affects the required number of parcels in the same manner, the fact that all parcels might not all be affected to the same degree does not prevent the exception from applying.

Thus, we suggest that Regulation 18707.1 be revised to read as follows:

18707.1. Public Generally. General Rule.

(a) Except as provided in Government Code sections 87102.6 and 87103.5, the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally if both subdivisions (b)(1) and (b)(2) of this regulation apply.

(b) Significant Segments and Indistinguishable Effects.

(1) Significant Segment. The governmental decision will affect a "significant segment" of the public generally if any of the following are affected as set forth below:

(A) Individuals. For decisions that affect the personal expenses, income, assets, or liabilities of a public official or a member of his or her immediate family, or that affect an individual who is a source of income or a source of gifts to a public official, the decision also affects:

(i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents; or

(ii) 5,000 individuals who are residents of the jurisdiction.

(B) Real Property. For decisions that affect a public official's real property interest, the decision also affects:

(i) Ten percent or more of all property owners or all homeowners in the jurisdiction of the official's agency or the district the official represents; or

(ii) 5,000 property owners or homeowners in the jurisdiction of the official's agency.

(C) Business Entities. For decisions that affect a business entity in which a public official has an economic interest the decision also affects 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession. For purposes of this subdivision, a not for profit entity other than a governmental entity is treated as a business entity.

Fair Political Practices Commission
Re: *Public Input: Public Generally Exception*
Wednesday, June 4, 2003
Page 5 of 5

(D) Governmental Entities. For decisions that affect a federal, state or local government entity in which the public official has an economic interest, the decision will affect all members of the public under the jurisdiction of that governmental entity.

(E) Exceptional Circumstances. The decision will affect a segment of the population which does not meet any of the standards in subdivisions (b)(1)(A) through (b)(1)(D), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.

(2) Substantially the Same Manner: The governmental decision will affect a public official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation. Variations in the degree to which such a regulation can be expected to affect the significant segment identified in subdivision (b)(1) of this regulation shall not operate to prevent the application of this exception.

Finally, we note that the suggestion of the staff that there is no need to reach the Public Generally exception in many cases because of the presumption found in Regulation 18705.2(b), is of little value because the practical requirements the FPPC staff feels constrained to impose to demonstrate that the presumption has not been overcome, while theoretically possible, as a practical matter borders on the impossibility. Thus, the materiality presumptions found in the existing regulations are of no help as presently written.²

Thank you for the opportunity that you have provided to participate in your rule making procedure. I also want to take this opportunity to express my sincere thanks and appreciation for the excellent work of your staff in reaching out to interested persons for comments on this subject. In particular, Natalie Bocanegra has been extremely helpful in recent conversations I have had with her.

Very truly yours,



ROBERT WESTMEYER
County Counsel

² Nor are the regulations relating to zoning helpful since they relate to "the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest". Here we are focusing on zoning regulations that do not change the zoning or land use designation of the property but rather are supplementary regulations that uniformly apply to all parcels regardless of the zoning or land use designation of a particular parcel of property.